FILED
JUN 25 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1402

IN THE

Supreme Court of the United States

ROBERT WILLIAMS,

Petitioner,

v.

HOME DEPOT U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's granting of summary judgment against the Plaintiff-Petitioner, where the District Court found, relying on well-settled principles for determining summary judgment in employment discrimination cases, that Petitioner failed to present sufficient evidence of discriminatory or retaliatory intent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Home Depot U.S.A., Inc. discloses that it is the wholly-owned subsidiary of The Home Depot, Inc., which is publicly traded. No publicly-held company owns 10% or more of The Home Depot, Inc.'s stock.

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STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 1

RULE

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STATEMENT OF THE CASE

The Petition seeks review of a decision of the United States Court of Appeals for the Second Circuit, affirming summary judgment for Respondent Home Depot U.S.A., Inc., on Petitioner Robert Williams's claims that he was subjected to race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The Petition should be denied.

I. INTRODUCTION

On July 12, 2002, Petitioner Robert Williams ("Williams"), proceeding *pro se*, brought suit in the United States District Court for the Southern District of New York against his former employer, Home Depot U.S.A., Inc. ("Home Depot"), claiming race discrimination and retaliation under Title VII. Specifically, Williams claimed that Home Depot's supervisors discriminated against him by criticizing his lackluster performance (with no mention of race) and issuing him disciplinary notices, and by ultimately terminating his employment as part of a reduction in force ("RIF"). Williams also claimed that Home Depot retaliated against him for complaining internally that his supervisors were unfairly disciplining him, even though Williams admits that he never complained that anyone had discriminated against him because of his race or on any other basis.

Williams has not presented any compelling reason for the Court to grant his Petition, and certainly has not shown the existence of a conflict among federal courts on an important federal question. *See* Sup. Ct. R. 10. Review in this Court is generally not available where the Petition asserts only the misapplication of properly stated legal rules or

erroneous factual conclusions by the lower court. *Id.* Here, the Court of Appeals applied well-settled law, accepted in every Circuit, and came to the only possible conclusion. Specifically, the Court of Appeals held that the District Court correctly applied the summary judgment standard in the context of the established framework for determining Title VII claims to find no genuine issue of material fact on Williams's discrimination and retaliation claims.

To understand why the Court of Appeals' decision involved the typical application of accepted legal principles and requires no further review, it is important to first consider the critical uncontested facts, which are set forth below. In sum, Williams's only "evidence" of discrimination are the bare facts that he was disciplined, he was terminated during a reduction in force, and he disagrees that Home Depot should have disciplined or terminated him. Williams did not identify any racial remarks or any other facts that could raise an inference of discriminatory animus on the part of his supervisors (two of whom were the same race as Williams – African American) or any decision-maker. Moreover, Williams did not present any evidence to contradict Home Depot's legitimate reasons for its disciplinary actions or his termination.

Williams attempts to divert the Court's attention from his undeniable lack of evidence by arguing that review is necessary for the Court "to stop the [lower] Courts from 'abusing' Judicial Proceedings with *Pro-se* litigants," and further arguing that "Summary orders have to be eliminated on 'competent' *Pro-se* claims." (Pet. Br. 19, n. 12.) Plainly, even a *pro se* plaintiff is required to adduce sufficient evidence of discrimination to overcome summary judgment. And, contrary to Williams's implication, the District Court explicitly construed Williams's pleadings and evidence

liberally, as due a *pro se* plaintiff. Nonetheless, the Second Circuit affirmed summary judgment in accord with the other Courts of Appeals and the applicable established rules of law, based on Williams's liberally-construed, but still insufficient, summary judgment evidence. Review by the Court is not required or appropriate to stop the Second Circuit from granting summary judgment against a *pro se* litigant on any claim, no matter how unsubstantiated.

II. STATEMENT OF FACTS

A. Williams's Employment with Home Depot

Williams, who is African-American, was initially placed in Home Depot's New Rochelle, New York store by a temporary agency for a three-week assignment beginning in 1999. Home Depot hired Williams on a full-time basis as a Sales Associate in the millwork department of the New Rochelle store on August 11, 1999. Williams's supervisor at the time was Andre Billups, who is also African-American and who had helped Williams apply for and obtain his full-time position. In approximately May 2000, Mr. Billups transferred to another department and John Phelps, who is also African-American, became Williams's supervisor. Mr. Phelps also had assisted Williams in applying for and obtaining his full-time job with Home Depot. In October 2000, Williams transferred to the plumbing department where his supervisor was Mohamed Rasheed, who is of Southeast Asian descent.

When Williams was first hired for his full-time position, he was given a copy of Home Depot's Associate Handbook ("Handbook"). The record is undisputed that Williams read the Handbook and signed an acknowledgment form to that

effect. Williams was also familiar with Home Depot's "Rules of Conduct" and specifically knew that unexcused absences, failing to work as scheduled, and insubordination were violations of the Rules of Conduct that could result in the termination of employment.

B. Williams's Ongoing Performance Deficiencies and Multiple Disciplinary Notices

From the outset of his employment with Home Depot, Williams had difficulty performing the requirements of his job. During Williams's two years working at Home Depot, he received five written disciplinary notices, verbal counseling, and five mediocre (at best) performance reviews. For example, on October 18, 1999, just over two months after Williams's full-time employment began, Mr. Billups issued him a written disciplinary notice for failing to report to work as scheduled.[1] Williams was informed that any further policy violations "could and will result in termination." Nonetheless, on August 8, 2000, Williams received another disciplinary notice, this time from Mr. Phelps, for excessive absenteeism. Specifically, Williams was cited for having approximately twelve absences in a three-month period. On January 2, 2001, Williams received yet another disciplinary notice from a third supervisor, William Hobart, who was an Assistant Store Manager. Mr. Hobart issued this notice because Williams again failed to report to work as scheduled.

A few weeks later, on January 23, 2001, Williams received yet another disciplinary notice from his Department

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[1] As stated in Home Depot's Rules of Conduct, strict adherence to associate work schedules is necessary "to provide floor coverage at all times, including evenings and weekends." Failure to abide by this policy puts a strain on the other associates in the store and affects customer service.

Head and direct supervisor, Mohamed Rasheed, for leaving his assigned work area without notifying management in advance. Specifically, Williams was found "watching the front lumber door" instead of working in his assigned department. This written notice followed prior verbal counseling by Mr. Rasheed about Williams leaving his work area without informing his supervisor. Williams alleges that on that same day, January 23, 2001, Mr. Rasheed stated that Williams "gave a lot of problems in his former department," a comment Williams found "offensive."

On June 3, 2001, despite the prior counseling and written disciplinary notice, Williams again left his work area without informing anyone in advance. After being informed of Williams's disappearance by a co-worker, "Jeff," who had been looking for Williams and could not find him, Mr. Rasheed met with Williams to discuss his repeated disciplinary problems. Mr. Rasheed again stressed to Williams the importance of following Home Depot policy and not leaving his work area without informing his supervisors.

Soon after, on August 1, 2001, Williams received yet another disciplinary notice, this time for insubordination, from Assistant Store Manager Jose Chan. The notice was based upon Williams's attempt to "punch out" approximately twenty minutes before the end of his shift without prior approval. Williams was fully aware that leaving before the end of a scheduled shift was a violation of Home Depot's time clock policy. Mr. Chan reminded Williams that he was required to work until the end of his scheduled shift and that

he should not be leaving early. Williams responded by saying: "If you have a problem, talk to [the Store Manager]."[2]

In response to these disciplinary notices, Williams, on two separate occasions, called Home Depot's "Alert Line" – a toll-free telephone service that enables Home Depot employees to report harassment or disrespectful treatment – to express his opinion that the notices were somehow unjustified. Williams, however, never made any mention of racial or other discrimination. Indeed, Home Depot investigated Williams's complaints and found no evidence of any wrong-doing on the part of Williams's supervisors.

During his short tenure with Home Depot, Williams also received five performance reviews informing him that he needed improvement in many areas, including "Willingness to Learn," "Showing Work Commitment," "Product, Department, and Store Knowledge," "Being a Team Player," and "Judgment." Williams's performance reviews also included comments such as that he did not always complete the work that was assigned to him, that he needed to learn how to control stress, that he needed to exhibit better judgment with respect to following Home Depot's policies and procedures, that he could not seem to "apply himself long enough to become a productive associate," and that he

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[2] Williams testified that he had made up the twenty minutes during his lunch break, which he and co-worker Mr. Doyen contended was an accepted practice. Williams also alleged that a coworker, who was giving Williams a ride, clocked out early that day and was not reprimanded. Williams did not identify this coworker or establish that Mr. Chan knew about his attempt to leave early. Williams also did not provide any excuse for his insubordinate remark to Mr. Chan, which was the basis of the disciplinary notice.

had "develop[ed] a negative attitude toward associates and management." Williams never received an overall rating greater than three out of five.

C. The Reduction in Force that Necessitated Williams's Termination of Employment

In September 2001, management in the New Rochelle store was informed that, in certain departments, the actual number of total associate work hours was exceeding the number of work hours budgeted. Given the decline in revenue that the store was experiencing following the September 11, 2001 terrorist attacks, Home Depot determined that an RIF was necessary in certain departments to bring actual work hours in line with budgeted hours.[3] Following the policy guidelines for RIFs, which include employee performance as a criterion, Williams, with his well-documented history of performance problems, was selected for inclusion in the

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[3] Between June and August 2001 and prior to the determination that the RIF was necessary, Home Depot hired a group of new employees to work the night shift in preparation for the implementation of the company's new "SPI" program which was scheduled to begin on September 3, 2001. The "SPI" program was an initiative designed to utilize night shift employees to down-stock the store's merchandise from high shelves to more accessible shelves during the night hours when stores were either closed or had less customer traffic. This would relieve the employees working the day-shift from having to perform such tasks and allow them to devote more attention to servicing customers. The night crew was fully staffed before the New Rochelle store was directed to reduce its workforce in departments where the store exceeded its expected staffing hours. The night shift was not considered for the RIF because it was not one of the areas where the actual number of associate work hours exceeded the number of work hours budgeted.

RIF.[4] Williams was one of ten employees in the New Rochelle store terminated as part of this RIF. Each of the ten terminated employees had received an overall rating of three out of five ("solid performance") on his/her last performance appraisal. Williams's employment was terminated on September 27, 2001.[5]

III. THE PROCEEDINGS BELOW

Following the close of discovery, Home Depot moved for summary judgment. On September 29, 2005, the District Court granted summary judgment to Home Depot and dismissed the Complaint in its entirety. The District Court first ruled that Williams had failed to prove that he had been subjected to a severe or pervasive hostile work environment,[6] because the comments Williams identified as hostile – *i.e.*, three remarks by his supervisor that Williams "gave a lot of problems in his former department"; that the supervisor

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[4] Under Home Depot's policies, when anticipating an RIF, stores should first consider reducing or rescheduling the hours of part-time associates. In this case, the New Rochelle store had already reduced the hours of all of its part-time sales associates to the minimum ten hours per week, but was still exceeding its budgeted hours. Consequently, the store was forced to layoff full-time associates.

[5] Williams's selection for the RIF was documented on an RIF worksheet. That worksheet was signed by Assistant Store Manager Ronnie Oddo, as Acting Store Manager, because the Store Manager, Ray Rockenseis, was on vacation at the time.

[6] Although the Complaint contains no allegations of a hostile work environment, the District Court, mindful of the need to construe *pro se* pleadings liberally, considered Williams's arguments on this issue even though they were raised for the first time in his opposition to summary judgment.

"could never find him"; and that Williams "does no work" – were race-neutral, and do not approach the threshold of actionability.

Next, the District Court concluded that Williams had failed to make out a *prima facie* case of disparate treatment, either with respect to Home Depot's disciplinary actions or his termination, because Williams did not offer any evidence that could give rise to an inference that Home Depot's actions were discriminatory. The District Court further concluded that Williams's race discrimination claims would fail in any event because Williams proffered no proof that Home Depot's legitimate, nondiscriminatory business reasons for the challenged employment decisions were a pretext for unlawful race discrimination. Specifically, the district court held that Williams could not show that the reasons for his disciplinary notices (*i.e.*, his absenteeism, failing to work his scheduled hours, leaving his assigned department without informing his supervisor after being warned, and insubordination) were pretextual, nor could he show that the reasons for his termination as part of an RIF (necessitated by an excess of associate work hours over the budgeted amount and declining store revenue after the 9/11 terrorist attacks) were pretextual.

Finally, the District Court concluded that Williams failed to make out a *prima facie* case of retaliation because the record demonstrated that, although he complained to Home Depot that he believed his discipline was unfair, he never complained of perceived discrimination, and thus did not engage in any protected activity. And again, even if Williams had made out a *prima facie* case of retaliation, he failed to show that the reasons for his disciplinary notices or termination were a pretext for retaliation.

On October 6, 2005, Williams appealed the District Court's summary judgment order to the Second Circuit. After full briefing, the Second Circuit affirmed the District Court's Order granting summary judgment for Home Depot on all of Williams's claims "for substantially the reasons given in the [the district court's] decision." (Pet. App. 3.).

REASONS FOR DENYING THE PETITION

Williams seeks to have the Court review narrow issues of fact relating to his failure to produce evidence of discrimination or retaliation sufficient to survive summary judgment under the well-settled standards for determining summary judgment in Title VII cases. The decision of the Second Circuit affirming summary judgment for Home Depot is not inconsistent with any decision of the Court or any decisions of the other Courts of Appeals. Moreover, Williams has shown no basis for his request that the Court stop the lower courts from granting summary judgment against any *pro se* litigant in any discrimination case. Accordingly, further review by the Court is not warranted.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE STANDARDS FOR SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

The Court has addressed, in numerous cases and in detail, the standards for summary judgment, and has confirmed that mere conclusory statements, conjecture, or speculation cannot by themselves create a genuine issue of material fact sufficient to avoid summary judgment. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[The non-movant] must do more than simply

show that these is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" (internal citation omitted)). This Court consistently has applied summary judgment principles no less in discrimination cases than in other areas of litigation. *See, e.g., Smith v. City of Jackson, Miss.*, 544 U.S. 228, 243 (2005) (affirming summary judgment in an Age Discrimination in Employment Act case); *Clark County School Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (reversing judgment of the Court of Appeals, which reversed summary judgment for the employer in a Title VII case). Williams does not and cannot show that the Court of Appeals deviated from these standards, nor that there is any argument that merits this Court's attention by way of certiorari review.

In fact, Williams's "argument" in his Petition is *not* that the Court of Appeals or District Court misstated or misapplied any substantive law. Rather, Williams merely disagrees with the application of that well-settled substantive law in *his* case, to the insufficient evidence he presented. Williams argues that the courts should ignore summary judgment standards and the *McDonnell Douglas* framework, and *never* grant summary judgment against a *pro se* plaintiff in an employment discrimination case once the plaintiff presents *any* scintilla of evidence, even if the plaintiff's "evidence" is patently inadequate.

Here, for example, Williams claims that the lower courts should not have granted summary judgment on his discriminatory termination claim, because he presented evidence that an Assistant Store Manager rather than a Store Manager signed his RIF worksheet, and claims that this was a "'Systematic Abandonment' of Internal Termination

policies." (Pet. Br. 10, 13.) Williams never explains how or why this fact supports an inference of discrimination. His speculation that Home Depot had an Assistant Store Manager rather than a Store Manager sign his RIF worksheet because of some secret racial motivation is not sufficient evidence to overcome summary judgment. In general, Williams's persisting unsupported belief that Home Depot acted out of discriminatory animus rather than its well-documented, legitimate business reasons, and his personal disagreement with the findings of the lower courts, do not present issues appropriate for the Court's review.

The lower courts also correctly applied well-settled law in granting summary judgment on Williams's retaliation claim. The undisputed facts establish that Williams did not engage in any "protected activity" within the meaning of Title VII, because none of his complaints, including his calls to the Home Depot Alert Line, made any mention of race or any other type of discrimination. Rather, Williams only ever complained that Home Depot's disciplinary actions were somehow unfair or unwarranted. The law is well-established, and the Courts of Appeals agree, that while a complaint may be based on an employee's good faith belief that he has been discriminated against, to be protected activity, the employee's complaint at least must allege some form of discrimination protected by Title VII. *See, e.g., Harris-Childs v. Medco Health Solutions, Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (finding no protected activity where plaintiff never mentioned that her complaints of unfair treatment were connected to race or sex); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006) ("Although filing an official complaint with an employer may constitute statutorily protected activity under Title VII, the complaint must indicate the discrimination occurred because of sex, race, national

origin, or some other protected class."); *Anderson v. Academy School Dist. 20*, 122 Fed. Appx. 912, 916 (10th Cir. 2004) ("[A] vague reference to discrimination and harassment without any indication that this misconduct was motivated by race (or another category protected by Title VII) does not constitute protected activity and will not support a retaliation claim.").[7] Because the undisputed record demonstrates that Williams failed to complain about race or any other type of discrimination, the lower courts properly held that he failed to make out a *prima facie* case of retaliation.[8]

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[7] *See also Gadieri-Ambrosini v. Nat'l Realty Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998); *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 702 (3d Cir. 1995); *Richardson v. Richland County School Dist.*, 52 Fed. Appx. 615, 617 (4th Cir. 2002); *Willoughby v. Allstate Ins. Co.*, 104 Fed. Appx. 528, 531 (6th Cir. 2004); *Wiehoff v. GTE Directories Corp.*, 61 F.3d 588, 598 (8th Cir. 1995); *Mincey v. City of Bremerton*, 38 Fed. Appx. 402, 406-07 (9th Cir. 2002); *Bond v. Dep't of Air Force*, 202 Fed. Appx. 391, 396 (11th Cir. 2006); *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006).

[8] As one of his Questions Presented, Williams asks whether the Second Circuit was required to apply the law as stated in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). However, in his Petition, Williams does not explain how the Second Circuit departed from the Court's decision in that case. Williams's only argument that the Court of Appeals erroneously affirmed summary judgment on his retaliation claim appears to be that he believed that the actions about which he complained were in violation of Title VII, and therefore his complaints constituted protected activity. As explained above, even if an employee has a good faith belief that he has been discriminated against, he must make his employer aware that he is opposing discrimination, and not just disagreeing with the employer's decisions. Moreover, *Burlington Northern* does not support Williams's position, or even address whether an employee's good faith belief that he has been discriminated against, when communicated to the employer, is protected activity.

In summary, the questions presented by Williams do not warrant certiorari review because the lower courts thoroughly considered all of the summary judgment evidence under the well-established principles set by the Court. Simply put, that evidence failed to establish that Home Depot took any employment action against Williams because of any discriminatory or retaliatory motive. No further review of the straightforward application of the law to the undisputed facts here is necessary or appropriate.

II. THE PETITION DOES NOT AND CANNOT SHOW ANY CONFLICT AMONG THE COURTS OF APPEALS

The Petition also should be denied because Williams does not and cannot show any conflict between the Court of Appeals' decision here and any decision of the other Courts of Appeals, nor does he identify any important or controversial federal question raised by the decision. *See* Sup. Ct. R. 10.

Williams summarily states that the Second Circuit is in conflict with the Seventh, Eighth, and Ninth Circuits because the District Court did not draw all inferences in favor of the non-movant, disregarded Williams's evidence, weighed Williams's credibility, and did not construe Williams's pleadings in a liberal manner. (Pet. Br. 11-15.) These conclusory statements mischaracterize what the courts below actually did in granting Home Depot summary judgment. Indeed, Williams's argument is belied by the plain language of the District Court's opinion, which explicitly stated the principles Williams claims the lower courts ignored. For example, the District Court recognized that "plaintiffs proceeding *pro se* – particularly in cases involving civil rights

allegations – 'deserve special latitude on summary judgment motions' and their 'submissions . . . must be generously and liberally construed.'" (Pet. App. 12 (internal citations omitted).) Similarly, the Court of Appeals explicitly stated the correct principles for determining summary judgment:

> In determining whether there are genuine issues of material fact, this court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." This Court will affirm the dismissal of a claim on summary judgment if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

(Pet. App. 2-3 (internal citations omitted).)

Moreover, even if Williams somehow could show that the Court of Appeals and District Court misapplied any of these principles to his meager "evidence," such a misapplication of properly stated law would not be a conflict between the circuits, and certainly would not warrant the issuance of a writ of certiorari.[9]

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[9] Even if this Court were to review the lower courts' application of the properly stated, established law to the facts of this case at this stage, all of the cases Williams cites from the Seventh, Eighth, and Ninth Circuits are either supportive of Home Depot's position and the lower courts' decisions, readily distinguishable from this case, or completely irrelevant.

CONCLUSION

The decision in this case did not deviate in any way from established summary judgment principles. Williams presented no evidence tying any of Home Depot's actions to discriminatory or retaliatory intent. Indeed, Home Depot's disciplinary actions and Williams's termination were all supported by legitimate business reasons, including Williams's absenteeism, insubordination, and poor judgment, as documented by at least five different supervisors, two of whom were Williams's race. Accordingly, the summary judgment below was the result *not* of any novel argument or egregious mistake by the lower courts, but of Williams's failure to meet his burden. No further review of the Court of Appeals' decision is warranted. For all of the reasons set forth herein, Home Depot requests that this Honorable Court deny the Petition.

Respectfully submitted,

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